



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Northwest Hydraulic Consultants, Inc.

File: B-266211

Date: November 17, 1995

John Lukjanowicz, Esq., and Robert J. Burke, Esq., Oles Morrison & Rinker, for the protester.

Lafayette N. Johnson, Esq., Federal Emergency Management Agency, for the agency. Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging decision to convert unrestricted procurement into small business set-aside is denied where contracting officer reasonably determined that at least two responsible small businesses would submit reasonably priced offers.

DECISION

Northwest Hydraulic Consultants, Inc. protests the award of a contract to any other firm under synopsis No. 96-065, issued by the Federal Emergency Management Agency (FEMA) for performance of flood studies in various FEMA regions, including FEMA Region X, which covers the states of Alaska, Idaho, Oregon, and Washington. Northwest contends that FEMA improperly converted an unrestricted procurement into a small business set-aside, and that the agency otherwise improperly evaluated technical proposals.

We deny the protest.

The flood studies which are the subject of this procurement are classified as architect-engineer (A-E) services and are required by FEMA to enable the agency to administer a national flood insurance program. FEMA's A-E procurements are conducted under the selection procedures set forth in the Brooks Act, 40 U.S.C. §§ 541 et seq. (1988). Under these procedures, after publicly announcing a requirement in the Commerce Business Daily (CBD), the agency establishes an evaluation board to review the performance data and statements of qualifications submitted by interested A-E firms that wish to be considered for this requirement. The evaluation board then conducts discussions with no less than three firms, ranks them, and submits the firms' stated qualifications to a selection official who selects the most highly qualified offeror. Negotiations are then conducted with that offeror. See generally Federal Acquisition Regulation (FAR) subpart 36.6.

On March 13, 1995, FEMA published synopsis No. 96-065 in the CBD, stating that it intended to award multiple contracts for flood insurance studies in various geographic regions, and requesting interested parties to submit a completed Standard Form (SF) 254 (A-E and Related Services Questionnaire, see FAR § 53.301-254) and an SF 255 (A-E and Related Services for Specific Project Questionnaire, see FAR § 53.301-255), which are the standard forms on which interested firms provide and detail their qualifications. In the synopsis, FEMA advised prospective firms that contracts for six of the identified regions would be set aside for small businesses; however, contracts to be awarded for region VII and X were unrestricted. The synopsis required all interested A-E firms to submit the required SF 254 and SF 255 by 4 p.m. on April 14.

On April 10, Northwest submitted the required forms for the Region X competition. By letter dated May 24, FEMA advised Northwest that the agency had completed its initial evaluation and directed the protester to respond to additional qualification questions by June 7.

On May 31, Northwest submitted the supplemental responses to the agency. On September 7, while waiting for the results of the agency's second qualifications evaluation, Northwest learned that the Region X competition had been converted to a total small business set-aside in response to a competitor's protest. On September 20, Northwest filed this protest at our Office, challenging the set-aside decision.

The record shows that on April 14, a small business competitor--the Montgomery Water Group (MWG)--filed an agency-level protest with FEMA which argued that the Region X competition should be restricted to small businesses. In response to this protest, the contracting officer referred the matter to the FEMA Director of Small and Disadvantaged Business Utilization (DSDBU) for further consideration. FEMA reports that it did not initially reserve the Region X competition for exclusive small business competition since it did not expect at least two small businesses in that region to submit reasonably priced offers.

After reviewing the MWG protest, the DSDBU received several telephone calls from small businesses located in Region X advising her that they intended to compete for the Region X contract. As a result of these telephone contacts, the DSDBU determined that there was a reasonable expectation that at least two small business concerns would submit reasonably priced offers for the Region X competition; consequently, the DSDBU advised the contracting officer to convert the Region X competition to a small business set-aside.

As a general rule, a procurement must be set aside for small businesses where the contracting officer determines that there is a reasonable expectation that offers will be received from at least two responsible small business concerns and that award will be made at a fair market price. FAR § 19.502-2(a). A decision whether to set aside a procurement for small businesses is essentially a business judgment within the contracting officer's discretion, which we generally will not disturb absent a showing that this discretion was abused. Israel Aircraft Indus., Inc., B-258229, Dec. 28, 1994, 94-2 CPD ¶ 262. A contracting officer may rely on advice from the agency's small business specialist in deciding whether or not to set aside a procurement. See Raven Servs. Corp., B-243911, Aug. 27, 1991, 91-2 CPD ¶ 203.

In this case, as discussed above, the DSDBU official received serious expressions of interest in competing on this requirement from more than two qualified small business concerns, which prompted her to counsel FEMA to conduct the Region X procurement as a total small business set-aside. Under these circumstances, we find FEMA's determination to reserve the Region X contract for exclusive small business competition to be unobjectionable.¹

In its protest, Northwest argues that because the MWG agency-level protest was untimely filed after all interested competitors' SF 254 and 255 qualification statements had been submitted, the agency was barred from converting the procurement to a small business set-aside. In this regard, the FAR provides that agency-level protests concerning alleged solicitation improprieties—such as a

¹Northwest makes no substantive challenge to the agency's determination that the statutory requirements for a small business set-aside—that the agency could expect to receive offers at reasonable prices from at least two responsible small businesses—were met. Northwest indirectly challenges this decision by arguing that its qualifications should have been taken into account in the set-aside decision, on the theory that the qualifications of potential small business offerors would be shown to be inferior when compared with the qualifications of Northwest. Northwest's argument is based on a misunderstanding of the purpose of the small business set-aside determination, which focuses not on a comparison of potential small business and large business offerors but on whether the agency reasonably expects to receive offers at reasonable prices from two responsible small businesses.

procurement's status as unrestricted or set aside--should be filed prior to bid opening or the closing date for receipt of proposals. See generally FAR § 33.103(b)(2). Even assuming that MWG's agency-level protest was untimely filed, however, lack of timeliness is no bar to an agency's taking appropriate action--here in the form of restricting the Region X contract to exclusive small business competition--regardless of when the matter is brought to its attention.² See Park Inn Int'l Airport, B-248369.2; B-248680, May 20, 1992, 92-1 CPD ¶ 458. Accordingly, the alleged untimeliness of MWG's agency-level protest, by itself, does not provide a valid basis for objecting to the small business set-aside restriction in this case.

The protester attempts to characterize the agency's action here as a failure to follow the evaluation scheme by factoring size status into the evaluation. This argument completely mischaracterizes the agency's action. The agency's decision to set the procurement aside for small businesses is distinct from the evaluation of proposals. The set-aside decision made small business size status a prerequisite for participation in the competition; it in no way represents a deviation from the evaluation scheme announced in the synopsis. The protester's related arguments--that the contracting officer acted in derogation of the authority of the A-E Board and the source selection official to evaluate proposals for technical merit, and that there is insufficient documentation in the record to "exclude" Northwest from the competition--are based on the same mischaracterization of the agency's action and are similarly without merit.

The protest is denied.

Comptroller General
of the United States

²Once a contracting officer determines that there is a reasonable expectation that bids from at least two small business concerns will be received and that award can be made at a reasonable price, an agency may cancel a solicitation and convert an unrestricted procurement to a small business set-aside. See Baker Support Servs., Inc.; Management Tech. Servs., Inc., B-256192.3; B-256192.4, Sept. 2, 1994, 95-1 CPD ¶ 75; American Dredging Co., B-201687, May 5, 1981, 81-1 CPD ¶ 344.